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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF GUAM**

11 UNITED STATES OF AMERICA,	)	CRIMINAL CASE NO. 08-00018
	)	
12 Plaintiff,	)	
	)	
13 vs.	)	<b>UNITED STATES' SUPPLEMENTAL</b>
	)	<b>MEMORANDUM IN OPPOSITION</b>
14	)	<b>TO DEFENDANT VERDERA'S</b>
	)	<b>MOTION FOR SEVERANCE</b>
15 ERNESTO PAGLICAWAN VERDERA and	)	
16 MARK ANTHONY BARTOLOME,	)	
	)	
17 Defendants.	)	
_____	)	

19 A. New Counts of Superseding Indictment

20 Federal Rule of Criminal Procedure 8(b) permits the joinder of defendants in the same  
21 indictment when the defendants "are alleged to have participated in the same act or transaction  
22 or in the same series of acts or transaction constituting an offense or offenses." Fed.R.Crim.P.  
23 8(b). Such defendants may be charged in one or more counts together or separately and all of the  
24 defendants need not be charged in each count. Id.

25 In this case, both defendants, Verdera and Bartolome, are charged with conspiracy to  
26 smuggle bulk cash out of the United States, and bulk cash smuggling in Counts I and II of the  
27 superseding indictment, respectively. Only co-defendant Bartolome is charged with drug  
28

1 importation in Count III. Defendant Verdera contends that his trial should be severed because he  
2 will be prejudiced by evidence relating to the co-defendant or the Count III - drug importation  
3 offense for which he is not charged. The assorted glass pipes and drugs which the government  
4 intends to introduce, among other things, were discovered by law enforcement inside luggage  
5 belonging to defendant Verdera. All the charges involve overlapping proof.

6 It is settled law that, in general, co-conspirators should be tried together, particularly, as  
7 in this case, when the proof of the charges is based on substantially the same evidence. United  
8 States v. Freeman, 6 F.3d 586, 598 (9<sup>th</sup> Cir. 1993); United States v. Fernandez, 388 F.3d 1199,  
9 1242 (9<sup>th</sup> Cir. 2004). Courts have also recognized that any potential prejudice from the weight of  
10 the evidence against a co-defendant can be readily cured by appropriate instructions to the jury.

11 The Ninth Circuit has rejected severance motions based upon disparity of evidence. For  
12 example, in United States v. Kennedy, 564 F.2d 1329, 1334 (9<sup>th</sup> Cir. 1977), although the  
13 defendant contended that “the government’s ploy was to infect each defendant with the acts and  
14 transgressions of the other defendants,” and that a “parade of horrors” would never have been  
15 admitted had he been tried alone, the court denied severance. The court stated “[i]t is not  
16 surprising that a defendant might prefer to be tried separately so that only evidence admissible  
17 strictly against him would be heard by the jury. However, if this formed the only basis for  
18 prejudice required for severance, the consequent volume of separate trials of multiple actions in  
19 a series of similar and connected illegal transactions would create an intolerable burden on the  
20 trial courts. Serious consideration is properly to be given to the factor of judicial economy by  
21 the trial court in the exercise of its discretion when severance is sought.” Id.

22 That the evidence as to one defendant is stronger than it is against another does not  
23 mandate severance. See United States v. Polizzi, 801 F.2d 1543, 1545 (9<sup>th</sup> Cir. 1986) (existence  
24 of more incriminating evidence against one co-defendant does not justify separate trials); United  
25 States v. Vasquez-Velasco, 15 F.3d 833, 846 (9<sup>th</sup> Cir. 1994)(“gruesome and emotionally  
26 moving” tape of interrogation of murdered DEA agent used as evidence against co-defendant did  
27 not justify separate trials); United States v. Felix-Gutierrez, 940 F.2d 1200, 1208-09 (9<sup>th</sup> Cir.

1 1994)(defendant charged as accessory after the fact in connection with murder of DEA agent  
2 was not entitled to severance where charges against defendant and co-defendants occurred  
3 during brief time span, involved many of the same participants, and were connected by  
4 overlapping proof).

5 In this case, although some evidence may be introduced that is relevant to the guilt of the  
6 co-defendant, the jury can be expected to compartmentalize the evidence specific to individual  
7 defendants, and the use of limiting instructions will prevent any “spillover effect” of the  
8 additional count against co-defendant Bartolome being used against the defendant.

9 Instructing the jury during the course of the trial and in jury instructions, for example, to give  
10 separate consideration to each defendant and each charge against a defendant, will be sufficient  
11 to cure any possibility of prejudice. See Zafiro v. United States, 506 U.S. 534, 540-41 (1993);  
12 Freeman, 6 F.3d at 599 (any prejudice that might have flowed from a joint trial was cured by  
13 limiting instructions that directed the jury to evaluate the evidence as to each defendant  
14 separately and not to consider evidence admitted against a co-defendant in deciding whether the  
15 government had proved its case against defendant); and Fernandez, 388 F.3d at 1243 (careful  
16 and frequent limiting instructions to the jury, explaining how and against whom certain evidence  
17 may be considered can reduce or eliminate any possibility of prejudice arising from joint trial).

18 B. Bruton Concerns

19 The Ninth Circuit has recognized that “[u]nder *Bruton* and its progeny, the admission of a  
20 statement made by a non-testifying codefendant violates the Confrontation Clause when that  
21 statement facially, expressly, clearly, or powerfully implicates the defendant. United States v.  
22 Angwin, 271 F.3d 786, 796 (9<sup>th</sup> Cir. 2001), cert.denied, 535 U.S. 966 (2002), *overruled on other*  
23 *grounds*, United States v. Lopez, 484 F.3d 1186 (9<sup>th</sup> Cir. 2007)(en banc) . In Richardson v.  
24 Marsh, 481 U.S. 200, 208 (1987), the Supreme Court limited *Bruton* to statements that are  
25 incriminating on their face or expressly incriminating since statements that only become  
26 incriminating when linked with other evidence are inherently less prejudicial. A statement is  
27 powerfully incriminating only when it is inculpatory on its face. Id. at 207. Statements that are

1 incriminating only when linked to other evidence in the case do not trigger application of  
2 *Bruton*'s preclusionary rule. *Id.* at 208.

3 A statement is not facially incriminating merely because it identifies a defendant.  
4 *Angwin*, 271 F.3d at 796. The statement must also have a "sufficiently 'devastating' or  
5 'powerful' inculpatory impact to be incriminatory on its face." *Id.* (citing *United States v. Olano*,  
6 62 F.3d 1180, 1195 (9<sup>th</sup> Cir. 1995)). In cases in which a co-defendant's statements are not  
7 powerfully and devastatingly inculpatory, the Ninth Circuit has rejected claims of *Bruton* error.

8 For instance, in *Olano*, a prosecution of a bank officer for making improper loans, the  
9 government introduced grand jury and deposition testimony of Olano's co-defendants - -  
10 including a co-defendant's oral statement that he had "two loans for Guy Olano to make." *Id.*,  
11 62 F.3d at 1195-96. The Ninth Circuit held that none of the challenged statements had a  
12 "sufficiently 'devastating' or 'powerful' inculpatory impact to be incriminatory [of Olano] on its  
13 face" for purposes of *Bruton*. *Id.*

14 Likewise, in *Angwin*, which involved two defendants convicted of bringing and  
15 transporting illegal aliens, the Ninth Circuit found that the use of the co-defendant's statements  
16 which put the co-defendant in the presence of the defendant during a road trip did not clearly  
17 inculcate him. *Id.*, 271 F.3d at 796-797. In *Angwin*, border patrol agents found 14 illegal aliens  
18 hiding throughout a motor home that the defendant (Angwin) was driving; the co-defendant  
19 (Khamis) was the only visible passenger. *Id.* at 792. The co-defendant's statements were  
20 admitted through testimony of a border patrol agent who testified to the effect:

21 According to [agent], Khamis indicated that the defendants had pulled  
22 off to the side of the road to let the dog walk around. After walking the dog  
23 briefly, Khamis allegedly told [agent] that she saw Angwin off to one side  
24 of the motor home speaking with an unidentified man. Angwin then asked  
her to get back into the motor home, to sit in the passenger seat, and not to  
say anything. Khamis told [agent] that she got back into the motor home and  
heard and felt others entering the home as well.

25 *Id.* at 793. The Ninth Circuit held that the co-defendant's statements were not facially  
26 incriminating. *Id.* at 797.

1 As well, redactions replacing the defendant's name with a neutral term would avoid any  
2 *Bruton* problem. United States v. Fernandez et al., 172 F.Supp.2d 1252, 1263-64 (C.D.Cal.  
3 2001). For example, in United States v. Logan, 210 F.3d 820, 823 (8<sup>th</sup> Cir.)(en banc),  
4 cert.denied, 531 U.S. 1053 (2000), no *Bruton* violation occurred when a police officer testified to  
5 a statement made by a co-defendant which was not recorded or written down. The officer  
6 replaced the name of the defendant with the phrase "another individual," and testified that the  
7 co-defendant said that he and "another individual" had planned and committed robbery. In  
8 Logan, the evidence was that only two people were involved in and charged with armed robbery,  
9 among other things, and the reference to "another individual" could only have been a reference  
10 to the defendant. Id. at 825. See also United States v. Coleman, 349 F.3d 1077, 1085 (8<sup>th</sup> Cir.  
11 2003)(substituting the phrase "someone" for the defendant).

12 In this case, the proposed redacted statements of Bartolome do not expressly implicate  
13 Verdera in the commission of any crime. See Exhibit A. (To be filed under Seal). None of the  
14 redacted statements as proposed amounts to an express confession or admission of guilt by the  
15 defendant.

16 For the foregoing reasons, the defendant's motion for severance should be denied.

17 RESPECTFULLY submitted this 23<sup>rd</sup> day of May 2008.

18  
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22 By: /s/ Marivic P. David  
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